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No.

IN THE
SUPREME COURT OF THE UNITED STATES

BRUCE E. GARDNER,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition For Writ of Certiorari To
The United States Court of Appeals
For The Federal Circuit.

PETITION FOR WRIT OF CERTIORARI

Bruce E. Gardner
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100pp

QUESTIONS PRESENTED FOR REVIEW

1. Bruce E. Gardner was permanently deprived of his liberty and property right to continued federal employment without a hearing or decision on the merits of either the appealed wrongful termination action or his discrimination action.

5 USC§7702(a)(1) grants the MSPB only 120 days from the date a "mixed case" is filed to decided whether the agency has proven a nondiscriminatory basis for Gardner's termination. The MSPB **never** set a hearing date, **never** conducted a hearing, and **never decided** either of the appealed issues but rather dismissed Gardner's timely filed "mixed case" on its own motion, on the 119th day after his appeal was filed, to get an additional 120 days to decide the mixed case.

5 CFR§ 1201.12 provides that the Board can not ignore a mandate imposed upon it by federal statute.

The threshold question presented for review is whether the MSPB's violations of federal law, it own rules, and regulations by its *sua sponte* dismissal of Gardner's timely filed appeal, deprived Gardner of his liberty and property rights to continued federal employment without due process of law, by not conducting a post-termination hearing or rendering a decision on the merits of both appealed issues within the mandatory 120 speedy decision limitation period. *Arnette v. Kennedy*, 416 U.S. 134, 169 (1974); *Cleveland Bd of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985). Therefore, Gardner should be reinstated with back pay and full benefits.

2. The Federal Circuit's June 6, 1997 decision in *Gardner v. Treasury, No 95-3770 (Fed.Cir. June 6, 1997)[Gardner II]*, that it lacked subject matter jurisdiction over the MSPB's violation of the law, its rules, and regulations because the U.S. District Court for the Eastern District of California had subject matter jurisdiction over Gardner's discrimination action is void and has no legal affect.[1] *Rogers v. Alabama*, 192 U.S. 230 (1904).

On February 28, 1997 the district court dismissed Gardner's discrimination action for want of subject matter jurisdiction since Gardner's "MSPB appeal is still pending [in the Federal Circuit], he has not exhausted his administrative remedies and can not yet seek judicial review." *Gardner v. Rubin, et al. CIV S-95 (E.D.Cal 1997).* The Federal Circuit under 28 USC§1295(a)(9) had jurisdiction to review the MSPB's violation of 5 USC§ 7702(a)(1), it rules, and regulations but declined to exercise it.

The second question presented for review is whether the Federal Circuit's June 6, 1997 decision was void from its inception because the court lacked authority to dismiss a case for want of subject matter jurisdiction when Congress clearly conferred it with "exclusive" jurisdiction over procedural matters involving the MSPB's interpretation of the law, its

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1 In *Gardner I*, the Federal Circuit held it lacked subject matter jurisdiction to review the MSPB's denial of Gardner's individual right of action filed pursuant to 5 U.S.C.§1221. However, the court had jurisdiction under 5 U.S.C.§1221 and 28 U.S.C.§1292(c) which grants the Federal Circuit subject matter over interlocutory orders involving injunctions as a matter of right. *Gardner v. Treasury, 95-3329 (Fed.Cir.1995)*

rules, and regulations. *Rogers; Chapman v. Goodnow*, 123 U.S. 540, 548 (1887). Therefore, Gardner's refiled December 16, 1997 appeal was timely since no decision was rendered by the Federal Circuit upon which the 35 day refiling period could be computed and Gardner is entitled to a hearing on the merits of both "mixed case" issues.

3. The Administrative Judge (AJ) is required to issue an Acknowledgment Order within three days of receipt of an appeal and that Order **must** address the timeliness of the appeal or else the timeliness issue is waived. The MSPB's Acknowledgment Order accepted Gardner's refiled December 16, 1997 appeal as timely. The agency acquiesced to the timeliness of the refiled appeal.

Fifty seven days before the scheduled hearing, the agency moved to dismiss Gardner's "mixed case" for want of subject matter jurisdiction based on an alleged filing delay .**A28.** The MSPB granted the agency's motion to dismiss.

Title 5 contains no filing deadlines, defendant was not prejudiced, and the MSPB's docket control and case management were unaffected by the timely refiled MSPB appeal.

The third issue presented is whether the MSPB's subject matter jurisdiction dismissal of Gardner's refiled mixed case was in direct conflict with:

✦this Court's decision in *Zipes v. TWA, 455 U.S. 385, 394 (1982)* that the filing requirements contained in regulations are **not** jurisdictional issues. Also see *Wallace v. MSPB*, 726 F.2d 1456, 1458 (Fed.Cir.1984) &

✦ the Federal Circuit's decision in *Hamilton v. MSPB 75 F.3d 639, 645 (Fed.Cir. 1996)* that the MSPB's timeliness regulations are directed at its docket control and case management, therefore, the MSPB must raise the untimely filing issue in its Acknowledgment Order or else it is waived.

4.. Regulatory filing requirements are policy decisions subject to waiver, estoppel, and equitable tolling". *Zipes; Wallace at 1458; Hamilton at 645.*

Gardner was diligently pursuing a final determination of *Gardner II* when he petitioned this Court for certiorari . Gardner exercised due diligence when he refiled his mixed case within 30 days from the date the Federal Circuit's initial decision became "final" by this Court denying certiorari. *Gardner v. Treasury,* #97-536 (U.S. Supreme Court, Nov. 17, 1997).

The final question concerning the deprivation of Gardner's property rights without procedural due process of law is when does a decision become "final"? Equity requires Gardner have a hearing based on his reasonable belief that the refiling period commenced from the date the Supreme Court denied certiorari, as the Federal Circuit held in *Anderson v. Dept of Army, 153 F.3d 574 (Fed. Cir. 1998).* See *Walls v. MSPB, 29 F.3d 1578, 1582, 1583 (Fed.Cir. 1994).*

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December 23, 1997, MSPB Acknowledgment Order.
(MSPB acknowledged re-filed appeal was timely filed.)

October 26, 1995, Initial Decision
(MSPB *sua sponte* dismissal of mixed case.)

April 13, 1995 Initial Decision
(MSPB *sua sponte* dismissal of mixed case.)

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

On April 26, 2000, Gardner timely filed a Motion for Rehearing & Suggestion For Rehearing In Banc. On May 18, 2000, the Federal Circuit denied the motion for rehearing and suggestion for in banc review. **A48.**

Gardner timely lodged a petition with this Court within 90 days from the date the petition for rehearing was denied. The Court allowed Gardner an additional 60 days to perfect the lodged petition. The corrected petition is lodged within the additional 60 days granted by this Court.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The authority relied upon includes the 5th Amendment, the statutes listed below, and the MSPB's own rules and regulations that are contained in the appendix.

5th Amendment, U.S. Constitution

1) 28 U.S.C.§1295(a)(9) states in part:

> The United States Court of Appeals for the Federal Circuit shall have **exclusive jurisdiction** over the MSPB's interpretations of laws, its own rules and regulations. [emphasis added].

2) 5 U.S.C.§7702(a)(1) states in part:

> ... **the Board shall, within 120 days** of the filing of the appeal, **decide both issues of discrimination and the appealable actions** in accordance with the Board's appellate procedures ...[emphasis added.].

3) 5 U.S.C.§7703(b)(1) states in part:

> ... a petition to review a final order or final decision of the Board shall be filed in the... United States court of appeals ...

4) 5 U.S.C.§7703(c) states in part [emphasis added below]:

In any case filed in the United States Court of Appeals for the Federal Circuit, the court **shall review the record and hold unlawful** and **set aside any agency action**, findings or conclusion found to be:

1) **arbitrary**, capricious, an abuse of discretion, **or** otherwise **not in accordance with law**;

2) obtained **without procedures** required by law, rules, or regulation having been followed, **or**

3) unsupported by substantial evidence.

STATEMENT OF THE CASE

A. GARDNER'S 5th AMENDMENT RIGHTS TO DUE PROCESS OF LAW WERE VIOLATED.

Bruce E. Gardner, was a 15 year multiple award winning IRS employee who was denied his "fundamental right" to a post-reinstatement hearing by the MSPB. The MSPB also deprived Gardner of his federal property rights to continued federal employment and liberty, except when cause is proved by the agency, by not rendering a timely decision on the merits of the case. The agency never proved its allegation that Gardner's off-duty conduct warranted termination. Nor was Gardner allowed to prove the agency's removal of the sole remaining minority in the IRS' Sacramento District Counsel's Office was racially motivated. Yet, Gardner was deprived of his livelihood without due process of law.

This basic principle of due process has unwaveringly been applied when a property right has been taken by the State. *Goldberg v. Kelly, 397 U.S. 545, 552 (1965).* However, Gardner's federal property right was taken without "an opportunity to be heard". In addition, the Federal Circuit declined to exercise its exclusive jurisdiction under 28 USC§

1295(a)(9) to review the MSPB's intentional circumvention of the **mandatory 120 day speedy decision statute** of 5 USC§7702(a)(1). Congress explicitly enacted this statute to ***stop*** the MSPB from its historical "excessive delay tactics" in deciding the merits of both issues in a "mixed case". P.L. 95-454, S.Rep 95th Cong. Sess. 51, Reprint in 1978 U.S. Code & Ad. News at 2874.

This Court held in *Loudermill* and *Arnette* that a timely post reinstatement hearing is required to protect a federal employee's Constitutional rights to due process and against arbitrary government actions. *Loudermill at 552, 547; Arnette at 157, 221.* Yet, in the instance case, Gardner was completely denied a hearing and therefore the Constitutional guarantee of due process.

B. MSPB VIOLATED MANDATORY 120 DAY SPEEDY DECISION STATUTE.

1. **MSPB Has No Legal Authority To Dismiss A "Mixed Case *Sua Sponte*.**

Congress under 5 USC§7701(a)(1) provided Gardner is entitled to a hearing on the agency's wrongful termination action. Since Gardner affirmatively asserted the termination was based on discrimination, Congress mandated by enacting 5 USC§7702(a)(1) that the MSPB **must** decide both issues of discrimination and termination raised in a "mixed case", within 120 days from the filing date of his MSPB appeal.

On December 15, 1994, Gardner timely filed his "mixed case" with the MSPB. On April 13, 1995, MSPB Administrative Judge Hughes dismissed Gardner's mixed case, *sua sponte* and over Gardner's objection. AJ Hughes' initial decision allowed Gardner to refile his "mixed case" by

letter and instructed him not to resubmit another MSPB appeal or supporting documents. In addition, "re-filing of the appeal would not trigger a new deadline for filing discovery motions. Rather, a ruling on the outstanding discovery motions will be made on re-filing." **A37.**

AJ Hughes' *sua sponte* dismissal was couched on "the rights of each party to a fair hearing obviously can not be guaranteed by adhering to the Board's normal 120-day time period for adjudicating an appeal **A37.** However, only Gardner and **not** the agency or MSPB had a right to a hearing. **A54** Furthermore, the mandatory 120 day speedy decision statute of 5 USC§7702 (a)(1) governs the time limits to decide the merits of Gardner's "mixed case" and **not** the Board's discretionary 120 day rule which applies only to non-mixed cases. 5 CFR§ 1201.156 also mandates a decision in "mixed cases" within 120 days of the appeal date.

AJ Hughes knew that violating the mandatory 120 day speedy decision statute would result in Congressional scrutiny of this mixed case pursuant to 5 USC§7701(i)(2). He also knew MSPB rules and regulations prohibited him from setting a hearing date with less than 15 days advance notice to the parties, and therefore he was prohibited from setting a hearing date after the 105th day after the appeal date. 5 CFR§ 1201.51(a). In addition, AJ Hughes knew:

✦ *he did not set a hearing date* within 60 days from the date Gardner's "mixed case" was filed, as required by MSPB regulations. *MSPB Judges Handbook*, Chaper 4, p 1, §4;**A54.**

✦*he did not conduct a hearing* on any of the "mixed case" issues within 105 days after Gardner timely filed his MSPB appeal; 5 CFR§ 1201.51(a)**A53.**

✦*he did not render a decision* on either Gardner's termination or discrimination actions within 85 days from the date the "mixed case" was filed, as required by MSPB regulations. *Gipson v. VA 1 MSPR 435 (1983).*

It should also be noted in an April 12, 1995 telephone conference, AJ Hughes' attempted to coerce Gardner to voluntarily withdraw his timely filed "mixed case" so he could have an additional 120 days to comply with 5 USC§7702(a)(1). **A37.** Gardner through his counsel, Joseph L. Russell, exercised his rights to a speedy decision by declining to voluntarily withdraw his timely filed "mixed case".**A51.** In response to Gardner's decision, AJ Hughes dismissed the timely filed "mixed case" *sua sponte* instead of dismissing the agency's removal action without prejudice and reinstating Gardner to his position as the law requires.[2]

AJ Hughes cited **no statute, no MSPB regulation,** nor rule granting the MSPB authority to dismiss a timely filed "mixed case" and force Gardner to refile his appeal when he objected to the dismissal. The mandatory 120 day speedy decision statute was enacted specifically to prohibit the MSPB from these types of excessive delay tactics.

2.The Speedy Trial Act, 18 U.S.C.§3161 *et. seq.*, would have dismissed the government case without prejudice if a trial was not commenced with the statutory 100 day period.

The MSPB's own rules do not grant the AJ authority to dismiss a timely filed appeal when appellant objects. **A54(3).** The MSPB rules, at best, would only allow the appeal to be continued, and then, only if the agency gave a compelling reason. 5 CFR §1201.51(a). The AJ sought a continuance in this case because of his failure to timely adhere to the law, rules, or regulations. Furthermore, AJ Hughes' intent to continue the "mixed case" rather than dismiss it is apparent from his decision that "re-filing will not trigger a new deadline for filing discover", re-filing can be accomplished by letter, and by the title of the October 17, 1995 "Order and Notice of Hearing and **Rehearing** Conference". **A37, A19.**

On May 15, 1995, Gardner petitioned the AJ's *sua sponte* dismissal of his timely filed "mixed case" to the full Board. On July 20, 1995, the Board without citing any statute, MSPB rule, or regulation held, AJ Hughes had judicial discretion to circumvent the mandatory 120 day speedy decision statute and 5 CFR § 1201.156. The Board characterized the AJ's circumvention of 5 USC§7702(a)(1) as a discretionary "procedural option". **A10.** The Board did not rule on Gardner's 5th Amendment right to a timely and meaningful post-reinstatement hearing. **A36, A6.** The Board informed Gardner of his right to appeal its decision and when Gardner exercised his appeal rights, the Federal Circuit declined to exercise its jurisdiction over the appeal. **A12**

2. <u>Stay Portion of Class Action Dismissed *Sua Sponte.*</u>

On August 24, 1995, Joseph L. Russell, Esq. filed a Protective Class Action with AJ Hughes on Gardner's behalf, because on August 23, 1995 Gardner filed a *pro se* petition with the Federal Circuit to review the Board's July 20th

decision. **A43.** AJ Hughes dismissed the Class Action portion of Gardner's Protective Class Action *sua sponte* and proceeded with the remainder of the case. However, 5 CFR §1201. 27(b) required the AJ to dismiss the entire case if the case was not going to proceed as a Class Action and then allow appellant 30 days to file an individual MSPB appeal. The AJ did not adhere to this regulatory requirement.

This second *sua sponte* dismissal was based on the Board's July 20, 1995 decision which AJ Hughes held restricted Gardner's re-filing to only the "mixed case" originally filed on December 15, 1994.**A20.** AJ Hughes ignored the fact that the "protective" portion of the Protective Class Action was tantamount to a stay of the MSPB proceeding. Instead of staying the MSPB proceeding as requested by Attorney Russell the AJ immediately set a hearing date and a detailed pre-hearing submission and conference schedule. **A19.**

It appears that the AJ only skimmed page one of the Protective Class Action and did not read page 2. **A44.** Nevertheless, Gardner's August 23, 1995 Federal Circuit petition should have automatically stayed all actions before the MSPB including the *sua sponte* dismissal of the Protective Class Action. Therefore, the AJ lacked authority to rule on the Protective Class Action until the Federal Circuit rendered a decision on *Gardner II*.

3. MSPB Mislead Federal Circuit

The MSPB mislead the Federal Circuit into believing Gardner's Protective Class Action constituted a refiling of his "mixed case" pursuant to the Board's July 20th decision. **A43.** Based on the Board's misrepresentations, the Federal

Circuit dismissed Gardner's petition without prejudice. **A22.** The court held Gardner could not simultaneously proceed in the Federal Circuit and before the MSPB.

Gardner filed a Motion for Reconsideration of the Federal Circuit's dismissal on his petition on the grounds that he had **not** refiled his "mixed case" and that a Protective Class Action, i.e., a stay, was filed. The Federal Circuit held Gardner's motion in abeyance and required him to have the MSPB proceeding dismissed before the court would rule on his motion. **A17.** The court also said **if**

> Gardner proceeds at the Board and does not prevail, he will be able to present his arguments concerning the 120-day period to this court after the Board completes its proceeding. **A18.**

But when Gardner presented the MSPB's violation of the mandatory 120 day speedy decision statute to the Federal Circuit "after the Board completed its proceeding", the Federal Circuit declined to review it. **A5.**

4. <u>Conditional Motion of Dismissal Filed With MSPB.</u>

Attorney Russell prepared and filed a conditional motion of withdrawal with AJ Hughes. **A46.** Attorney Russell's conditional motion stated **<u>if</u>** the Federal Circuit reinstated Gardner's petition **<u>then</u>** he would withdraw the Protective Class Action. **A46.** However, Attorney Russell's motion never took effect because AJ Hughes' October 26, 1995 ***sua sponte*** dismissal of the Protective Class Action occurred prior to the Federal Circuit's November 22, 1995 reinstatement of Gardner's petition. **A34-35**

C. FEDERAL CIRCUIT DECLINED TO EXERCISE JURISDICTION OVER MSPB VIOLATIONS OF THE LAW, ITS RULES, & REGULATIONS.

Prior to filing the Protective Class Action, Gardner on August 23, 1995, petitioned the Federal Circuit to review the MSPB's violations of the 5th Amendment, 5 USC§ 7702(a)(1), its own rules, and regulations. Gardner asserted the Federal Circuit had subject matter jurisdiction under 28 USC §1295(a)(9) and 5 USC§7703(c) to review the MSPB's excessive delay in affording him a hearing and decision on the merits. Gardner's brief cited this Court's decisions in *Mazo* and *Roth* which held, an excessive delay in affording a federal employee a post reinstatement hearing violated his 5th Amendment rights to due process and constituted an unlawful taking of his property by the State. *Armstrong v. Mazo, 380 U.S. 545, 552 (1965); Regent v. Roth, 408 U.S. 573 (1972).*

On June 6, 1997, the Federal Circuit declined to exercise its **exclusive subject matter jurisdiction** over the MSPB's violations of the law, its rules, and regulations. It held that "the court does not have jurisdiction to hear mixed cases those involving discrimination mixed with an appealable action-from the MSPB".**A6.** The Federal Circuit failed to recognize that no discrimination issues were ***decided by the MSPB*** nor were any discrimination issues appealed to the Federal Circuit. **A11.** Gardner's petition focused on the MSPB's misuse of a "procedural option" to circumvent 5 USC§7702(a)(1), MSPB rules, and regulations. **A10, A11.** The Federal Circuit should have relied upon its decision in *Wallace* and *Ballentine* to accept jurisdiction over the MSPB's *sua sponte* dismissal of Gardner's "mixed case" instead of citing *Williams* **A5,6.**. *Wallace v. MSPB. 728 F.2d 1456 (Fed.Cir.1984);Ballentine v. MSPB, 738 F.2d 1244*

(1984); Williams v. Dept. Of the Army, 715 F.2d 1485 (Fed.Cir. 1983). In *Ballentine* the court held:

> Until the merits of a "mixed" discrimination case are reached by the MSPB, procedural or threshold matters, not related to the merits of a discrimination claim before the MSPB may be appealed to this court. *Id. 1247.*

And in *Wallace*, the Federal Circuit specifically held it had jurisdiction to review the MSPB's dismissal of a mixed case and "this threshold issue is not excluded by 5 USC§7703(b) and the holding in *Williams". Id at 1459.*.

On the other hand, in *Williams* the MSPB rendered decisions on the merits of both the discrimination and removal actions. *Id at 1459.* Williams appealed the MSPB's discrimination decision to the district court and the merits of the agency's removal decision to the Federal Circuit. *Williams at 1486.* **No decision on the merits** was ever rendered on any mixed case issue in *Gardner II.* **A11.** Therefore, the Federal Circuit had subject matter jurisdiction over this case. *Wallace; Ballentine.*

1. **Federal Circuit's June 6, 1997 Decision Is Void.**

On June 6, 1997, the Federal Circuit was also under the mistaken belief that the U.S. District Court for the Eastern District of California had subject matter jurisdiction over Gardner's August 29, 1995 discrimination action filed in the district court. However, the district court had dismissed Gardner's discrimination action on February 28, 1997, four months prior to the Federal Circuit's June 6, 1997 subject matter jurisdiction dismissal. The district court held it lacked

subject matter jurisdiction because administrative remedies concerning MSPB procedural matters were currently pending before the Federal Circuit. Accordingly, the Federal Circuit had subject matter jurisdiction over the MSPB's intentional violation of 5 USC§ 7702(a)(1) but declined to exercise it! Therefore, its June 6th decision is void.

2. **Gardner Timely Refiled His Mixed Case".**

Within 90 days of the Federal Circuit's denial of Gardner's motion for reconsideration, he filed a petition for certiorari with this Court. The facts concerning the district court's February 28, 1997 dismissal were unknown to Gardner when he petitioned this Court because his Sacramento discrimination attorney, Jacque Whitfield, stated he never received notice of the district court's jurisdictional dismissal. Therefore, Gardner had no knowledge of the district court's dismissal and this matter was not brought to the attention of this Court. [3] On November 17, 1997, this Court finalized the Federal Circuit's initial June 6th decision, when it denied certiorari.

Pursuant to the re-filing instruction stated by AJ Hughes, and Gardner's desire to have a hearing on the merits, he refiled his "mixed case" on December 16, 1997, which was within 30 days from the date this Court denied certiorari. *Wallace at 1458.* The refiled appeal explicitly sets forth the procedural history of this case and specifically states the "mixed case" was timely refiled within 35 days from the date the Federal Circuit's initial June 6th decision became final. **A39-41.**

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3. In 1998, this issue was raised in a Fed.R.Civ.P. 60 motion filed with the Federal Circuit but the court refused to rule on the motion.

D. FEDERAL CIRCUIT DID NOT ADDRESS WHETHER THE LAW REQUIRED GARDNER TO REFILE HIS "MIXED CASE".

The Federal Circuit in *Gardner III* declined to address any of the threshold issues of whether Gardner was required to refiled his "mixed case" or whether Gardner's "mixed case" was in fact continued and not dismissed based on the restrictions attached to his refiling. **A21,23.** The Federal Circuit only addressed whether Gardner timely refiled his MSPB appeal and, if not, whether reasonable cause or excusable neglect existed for this untimely refiled appeal. To adequately address the refiling issue, it is essential to determine whether the June 6, 1997 decision was void, a void judgment has no legal affect and therefore Gardner's December 16, 1997 refiled appeal would be timely regardless of whether *Gardner II* was continued or dismissed.

E. GARDNER TIMELY REFILED HIS MIXED CASE.

1. MSPB Order Acknowledged Refiled Appeal As Timely.

On December 23, 1997, Administrative Judge Gee in an Acknowledgment Order accepted the refiled appeal as timely and the agency relied upon its affirmative, January 4, 1995 statement that the mixed case was timely.**A47.** AJ Gee then set April 1st and 2nd as the hearing dates and she set discovery and pre-trial submission dates. Discovery was conducted, MSPB conferences were held, and pre-hearing motions were filed by Gardner, responded to by the agency, and ruled on by the AJ.

Neither the MSPB's docket control or case management were adversely affected by the December 16, 1997 refiled appeal. The agency never alleged that they were prejudiced by the refiled appeal. The MSPB regulations

require its AJ's to raise the timely filing issue in its Acknowledgment Order or else it is waived. *Hamilton at 645.* The Acknowledgment Order must be filed within 3 days from receipt of the appeal. Here, AJ Gee waived the timeliness issue by not raising it in her Acknowledgment Order and the agency waived any objection it may have had based on its acquiesances and laches. Accordingly, Gardner's refiled appeal was timely.

2. MSPB Filing Requirements Are Not Jurisdictional Pre-Requisite But Rather Subject To Waiver.

On March 3, 1998, AJ Gee in response to the agency's jurisdictional motion to dismiss, dismissed Gardner's timely refiled appeal for lack of subject matter jurisdiction. **A28,33.** The MSPB held it lacked subject matter jurisdiction over Gardner's refiled appeal because it was not timely filed. The jurisdictional dismissal based on untimely filing is in direct conflict with the Federal Circuit's decision in *Wallace* and this Court's decision in *Zipes.. Id at 1458.* AJ Gee stated the 35 day filing period commenced from the Federal Circuit's initial June 6th decision and not from the date of this Court's November 17th denial of certiorari.

AJ Gee failed to recognize that Title 5 contains no filing requirements for MSPB appeals. *Id.* She also failed to recognize that the Board's jurisdiction over this "mixed case" derived from 5 USC§7701,§7702,§7513(d), and §7512. In addition, AJ Gee refused to adhere to this Court's decisio.. in *Zipes* which held, filing requirements established by regulations for administrative proceedings are **not jurisdictional prerequisites** but merely policy subject to waiver, estoppel, and equitable tolling

3. Gardner Exercised Due Diligence In Refiling Appeal.

Despite AJ Gee's subject matter jurisdiction dismissal, pursuant to 5 CFR§1201.22(c), she considered whether a reasonable basis existed for Gardner's untimely refiled appeal. AJ Gee ignored the Federal Circuit's decision in *Anderson*[4], that the refiling period commences after certiorari is denied. She also ignored the fact that reasonable cause existed for waiver of the filing regulations. Namely, Gardner was diligently seeking redress from the Federal Circuit on the MSPB's *sua sponte* dismissal of his timely filed December 15, 1994 "mixed case", and then sought review of the Federal Circuit's decision from this Court during the alleged 5 month filing delay.

AJ Gee ignored the fact that the equitable principle of excusable neglect is based on mistake of fact as a sufficient grounds to waive the filing requirement. Gardner was under the reasonal belief that the 35 day refiling period commenced from this Court's November 17th denial of certiorari, and not the Federal Circuit's initial June 6th decision.[5] Even if Gardner was mistaken about when the filing period commenced, that mistaken belief of fact or law constituted "excusable neglect" to waive the filing delay, especially since

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4.*Anderson v. Department of Army, 1998 U.S.App.LEXIS 17063.*

5. It should be noted that MSPB was not an impartial decision maker in this appeal. A civil suit was filed against the MSPB and two of its Board members for falsely stating Gardner had not filed his federal tax returns, when those tax returns were contained in its files and Gardner had filed a motion in limine and asserted the Board's privilege against the inclusion of tax records in MSPB records.A55.

the appeal was refiled within 35 days from the date Gardner believed he was required to refile his appeal. However, both the MSPB and Federal Circuit failed to recognize an equitable waiver for the filing delay..

On March 13, 1998, Gardner filed a motion for AJ Gee to reconsider her March 3rd decision. Despite the fact that AJ Gee waited 23 days (April 5th) to inform Gardner she had no authority to reconsider her initial March 3, 1998 decision, Gardner timely filed his MSPB petition for full Board review on April 7th. The Board sat on Gardner's petition for review for an additional 237 days before deciding not to review AJ Gee's March 3rd decision. The Board's decision not to review AJ Gee's initial decision made that decision "final". [Similarly this Court's decision not to review the Federal Circuit's decision in *Gardner II* resulted in a final decision.]

Gardner timely petitioned the Federal Circuit to review the Board's December 11, 1998 decision. On April 12, 2000, the Federal Circuit held Gardner failed to follow AJ Hughes' Order to refile because Gardner elected to exercise his Constitutional rights to appeal the MSPB's decision to this Court. **A2.** The Federal Circuit also held Gardner disregarded the Board's deadline by seeking "Supreme Court review". The court cited **no authority** for its propositions that:

● Gardner had no right under Fed.Cir. Rule 27(k) or 40 to file a motion for reconsideration or a petition for rehearing. And the 24 days (1 month) it took the Federal Circuit to decide Gardner's motion in *Gardner II* should be counted towards the 35 days Gardner had to refile his MSPB appeal.

- Gardner had no right to challenge its initial June 6, 1997 decision and then refile his MSPB appeal after this Court denied certiorari.

- Due diligence was not exercised when Gardner timely filed a petition with this Court within 87 days (3 months) from the date his motion for rehearing was denied by the Federal Circuit as allowed by S.C. Rule 13.1, 13.3, or 28 U.S.C. 1254(l). And those 87 days should be counted towards the 35 days he had to refile his MSPB appeal.

- It was unreasonable for Gardner to wait 22 days (1 month) for this Court to render a decision on his timely filed writ for certiorari. &

- It was unreasonable for Gardner to promptly file his MSPB appeal within 30 days (1 month) from the date this Court denied certiorari when he was allowed 35 days to refile.

In essence, the Federal Circuit ignored the fact that 4 of the 5 months it took Gardner to refile his mixed was directly consumed by matters pending before the Federal Circuit and this Court. And Gardner timely refiled his MSPB appeal within the remaining 30 days. **A2.**

REASONS FOR GRANTING CERTIORARI

I. DENIAL OF CONSTITUTIONAL GUARANTEE CALLS FOR EXERCISE OF THIS COURT'S SUPERVISORY POWER.

This case epitomizes the fundamental foundation on which this Nations stands, namely, that the State can not deprived any person of their liberty or property rights without

due process of law. "The right to due process is conferred, not by legislative grace, but by Constitutional guarantee." *Loudermill at 541; Arnette at 167.* In *Loudermill* this Court stated "at some point, delay in holding post reinstatement evidentiary hearings may become a constitutional violation. *Id* at 552, 547. Surely, a six year delay in holding a post-reinstatement hearing qualifies as a constitutional violation.

In the instance case, Mr. Gardner has not received a post reinstatement hearing despite timely filing a "mixed case" more than 6 years ago. The MSPB knowingly and intentionally violated Mr. Gardner's guaranteed 5th Amendment right to a timely post-reinstatement hearing by its *sua sponte* dismissal of his timely filed mixed case. The *sua sponte* dismissal not only denied Gardner of his property rights, but his liberty as well, because he could not expeditiously clear his name of the unsupported charges which wrongfully injured his reputation. *Arnette at 157.* It has long been held that the loss of constitutional rights for even minimal periods of time unquestionably constitute irreparable injury. *Elrod v. Burns, 427 U.S. 347, 373 (1976).*

The Federal Circuit which is conferred with the exclusive jurisdiction over MSPB procedural matters, declined to exercise its jurisdiction over this matter when it was first brought to the court's attention in *Gardner II.* **A18.** When the Federal Circuit had a second opportunity to honor and protect Mr. Gardner's rights to liberty and property, it once again declined to uphold its mandate and it completely ignored the Constitutional guarantee of procedural due process for which Mr. Gardner was entitled. "It is a necessary and well-settled rule that the exercise of jurisdiction by this Court to protect constitutional rights can not be

declined when it is plain that the fair result of a decision is to deny rights. *Rogers, Smithsonian Institute v.St. Johns,* 214 U.S. 19, *27 (1909).*

There is no issue more important in this Nation, then to protect the Constitutional guarantees of due process afforded its citizens. This Court in *Dent*[6] stated the principles of due process come from the laws of England where it was designed to protect the subject against the arbitrary actions of the crown and place him under the protection of the law. To date, Mr. Gardner has not received the protection of the law. This is the Court of last resort and is the only place where the Constitutional guarantee to protect Mr. Gardner's rights can be redeemed. Therefore, it is imperative for this Court to exercise its supervisory powers to ensure that Mr. Gardner receive the full canopy of protection under the law that are afforded other citizens.*Id.*

II. IMPORTANT QUESTIONS OF FEDERAL LAW NOT DECIDED BY THE FEDERAL CIRCUIT.

A. A Federal Agency Can Not Ignore A Federal Statute, Its Rules Or Regulations.

It is well settled that a federal agency can not ignore or intentionally circumvent a mandate imposed upon it by federal statute and must follow it own rules.[7] 5 CFR §1201.12 specifically prohibits the MSPB from ignoring a Congressional mandate imposed by federal statute. Yet, the MSPB wilfully violated the mandatory 120 day decision

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6. *Dent v. West Virginia, 129 U.S. 114, 123 (1989).*

7. *Accardi v. Shaughessy, 347 U.S. 260,265 (1954)*

statute of 5 USC§7702(a)(1) and 5 CFR§1201.156. The Federal Circuit which has exclusive matter jurisdiction under 28 USC§1295(a)(9) and 5 USC§7703© over MSPB procedural violations of the law, its rules, and regulations, held it lacked subject matter jurisdiction over this important issue.

The rights of all citizens are in jeopardy if an agency is not held accountable for violations of the laws specifically enacted to restrain and regulate its conduct. The MSPB was created to "protect the rights of [federal] employees". *Egan v. Dept of Navy, 802 F.2d 1583, 1573 (Fed.Cir. 1986).* Congress recognized a pattern of excessive MSPB delays in processing discrimination complaints.[8] In 1978, Congress enacted 5 USC§7702 (a)(1) specifically to **stop** the MSPB from its historical pattern of dilatory tactics with regard to discrimination actions. The statute required the MSPB to decided both the discrimination and termination actions within 120 days from the date the MSPB appeal is filed. In the instance case, the MSPB failed to comply with the law, its rules, and regulations and the Federal Circuit failed to comply with its mandate to review procedural matters concerning the MSPB's interpretation of the law, its rules, and regulations.

The " mandatory-not discretionary 120 day time limit" imposed on the MSPB to decide both issues in a mixed case was wilfully circumvented by the MSPB. *Id.* In the instance case, the MSPB knowingly and intentionally violated 5 USC§ 7702 (a)(1) by a *sua sponte* dismissal of Gardner's timely filed mixed case after he refused to voluntarily withdraw his

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8. P.L. 95-454, S.Rep.95th Cong. Sess, 51, Reprint in 1978 U.S. Code & Ad. News at 2874.

appeal. The MSPB's *sua sponte* dismissal occurred the day before the 120 day speedy decision period would expire and prior to a hearing date ever being set.

The motive behind the MSPB's *sua sponte* dismissal was to **cover-up** its failure to set a hearing date, conduct a hearing, or render a decision within the mandatory 120 day statutory period. The MSPB's *sua sponte* dismissal was designed to get the AJ 240 days to do what the law required be done within 120 days! This Court held in *Chapman* and *Navigation* that a court must exercise its jurisdiction over rights arising under statutes of the U.S. enacted to protect constitutional rights. *Chapman v Goodnow, 123 U.S. 540,548 (1887); Navigation Co v. Homestead, 123 U.S. 552 (1887).*

The Federal Circuit never addressed the important question of federal law concerning a federal agency's intentional violation of a Congressional mandate that specifically restricts the MSPB from delaying mixed case decisions. Nor did the Federal Circuit address the MSPB's violations of its own regulations and rules to further support the cover-up. The nationwide effect and impact on the rights of all citizens are at risk if a federal agency, such as the MSPB, is allowed to ignore federal statutes, its own rules and regulations, as well as, the Constitutional rights of its citizen. Accordingly, this Court should decide whether the MSPB and other federal agencies can ignore the law, its rules and regulations, and whether the Federal Circuit was bound to follow its own decision in *Saddler* and this Court's decision in *Accardi* on these issues.*Id at*, 265

B. A Judgment Is Void When A Court Declines To Exercise Jurisdiction Conferred By Congress.

"It has been the rule since nearly the inception of our republic that subject matter jurisdiction may be raised at anytime" and is not waiveable. *Ward v. Brown* 22 F.3d 516, 519 (2d Cir. 1994). In *Mitchell* this Court held an appellate federal court must satisfy itself not only of it own jurisdiction but also that of the lower courts in a cause of action under review. *Mitchell v. Maurer*, 293 U.S. 237,244 (1937). Subject matter jurisdiction provides access to federal courts. This Court has an obligation to ensure that litigants are not arbitrarily denied access to courts when Congress has conferred jurisdiction over the subject matter presented to that court.

A judgment is void if Congress grants a court jurisdiction over the subject matter but that jurisdiction is not exercised by the court. A void judgment is a legal nullity and a court has no discretion to decline its jurisdiction over the subject matter. *1st Nat'l Bank v. City Council Esterville, 215 U.S. 341 (1910); Rogers; Smithsonian Institution at 23.* This Court should settle the important threshold federal question of whether the Federal Circuit's June 6, 1997 decision is void because Congress conferred jurisdiction on the Federal Circuit, under 28 USC§1295(a) (9) and 5 USC§ 7703 (c), to review the MSPB's interpretation of the law, it rules, and regulations but the Federal Circuit declined to exercise its subject matter jurisdiction.

This Court should feel compelled to correct such a blatant jurisdictional oversight by the Federal Circuit.

III. FEDERAL CIRCUIT DECISIONS DIRECTLY CONFLICT WITH DECISIONS OF THIS COURT.

A. A Post-Reinstatement Hearing Must Be Given Federal Employees.

The Federal Circuit's decision in this case is in direct conflict with the line of precedential employment cases decided by this Court ranging from *Roth* to *Arnette* to *Loudermill*. This Court has continually acknowledged the "severity of depriving a person of the means of his livelihood". The longer the period between the discharge and the hearing, the more devastating the impact on loss of employment, damage to one's reputation, and the effects of racial discrimination. *Arnette* at 219. The Federal Circuit ignored these basic principles and elected not to address the MSPB's violation of the mandatory 120 day speedy decision statute which is an issue of first impression for that court and this Court.

This Court in *Roth* and *Perry* stressed the notion that the Executive Branch can not arbitrarily deprive a person of his job. *Perry v. Sindermann, 408 U.S. 593 (1972)* This Court in *Arnette* said in federal employment cases the U.S. Constitution and 5 USC§7513 require only "minimum due process" which does not include a pre-termination hearing but **a post-reinstatement hearing must be held** within a reasonable time after the employee is discharged to satisfy the due process requirements. *Arnette* 192. No hearing was held in this case.

Arnette involved a challenge by a former federal employee about procedures by which he was dismissed. In

1973, this Court held *Arnette* was not entitled to a pre-termination hearing but he **must** receive a post-reinstatement hearing within a reasonable time after his removal. Thirteen years later, this Court in *Loudermill* held delays in the vindication of an employee's reputation during the MSPB appeals process constitutes a deprivation of his property and his fundamental rights against discrimination. *Id. 542, 545.*

The adequacy of pre-deprivation procedures is in significant part a function of the speed with which a post-deprivation hearing is made. *Id.* 547. Accordingly, the Federal Circuit's decision to sustain the excessive MSPB delay in affording Gardner his rights to a post-deprivation hearing is an unlawful taking of his property and liberty. The government's taking of a citizens property and liberty rights without due process of law are important federal questions involving relevant decisions of this Court. *Id.* 552. This Court should review the Federal Circuit's decision and render a decision that is consistent with the employment line of cases stated above.

This Court should grant certiorari because the facts in this case are more egregious than those contained in this Court's decisions in *Loudermill, Goldberg, Perry, or Arnette.* Here the very agency Congress created to protect Gardner's rights, intentionally violated them. The legislation Congress explicitly promulgated to prevent the MSPB's excessive delays in rendering decisions was knowingly and wilfully violated. And here, the MSPB teamed-up with Treasury and the Federal Circuit because Gardner challenged each of their decisions by exercising the rights guaranteed him by the U.S Constitutional.**A32.** In essence, not only did the MSPB

intentionally ignore precedential decisions of this Court and Congress but it irreparably injured Mr. Gardner.

B. Agency Is Bound By Its Own Rules & Regulations.

This Court in *Accardi* and *Service* [9] and the Federal Circuit in *Sadder*[10] have held that an agency must follow its own rules and doctrine until it changes them, explicitly. The crucial questions in *Accardi* as here, is whether the alleged conduct of the agency deprived petitioner of any rights guaranteed him by statute or regulations. *Id 265.* This Court, unlike the Federal Circuit, did not find it necessary to determine the manner in which the agency exercised its discretion to determine that the agency violated the law and its *regulations. Id 266-268.* **A simple review of the regulations and whether the agency followed them was all that was necessary.**

In the instant case, it is obviously that the MSPB did not decide Gardner's mixed case in compliance with the mandatory 120 day decision statute of 5 USC§ 7702(a)(1). It should also be obvious after a simple review of the regulations set forth below that the MSPB did not comply with its own regulations

5 CFR§ 1201.24(d) affords Gardner a right to a hearing.

5 CFR§ 1201.156 requires the Board render a decision in a mixed case within 120 days after the appeal is filed.

9.Service v. Dulles,354 U.S. 363,388 (1957)

10. *Sadder v. Dept of Army, 68 F 3d 1357, 1358 (Fed.Cir.1995)*

5 CFR§ 1201.41(b) provides Judges "will take all necessary action to ...void delay in all proceedings".

5 CFR§ 1201.43(b) allows the judge to rule in favor of appellant on the existing record for failure to prosecute.

In addition, the following MSPB rules expressed in the *MSB Judge's Handbook* were in effect when Gardner filed his mixed case and were not followed:

The acknowledgment order must contain the appropriate standard paragraphs to cover untimely refiled appeals. Chp2,p2,§3d

The AJ should usually provide 30 to 60 days notice of the hearing date. Optimally, the hearing will be held within 75 days of the date of receipt of the appeal".Chp4,§4.

The Federal Circuit's failure to follow this Court's decisions in *Accardi* and *Service* deprived Gardner of his rights guaranteed by statute, rules, and regulations. A simple recognition that the MSPB acknowledged in its Order that the refiled mixed case was timely should have been sufficient to restore Gardner rights to a hearing especially since the MSPB rule states the issue of delay is waived if not contained in the Acknowledgment Order. *Hamilton at 645.*.

5 CFR §1201.43(b) requires the MSPB to make a ruling on the existing record, as opposed to invoking the ultimate sanction of dismissal when no hearing occurs. The MSPB record is extensive and AJ Hughes stated in his Acknowledgment Order that a ruling on the existing record would be made if no hearing was conducted, yet the AJ did

not render a decision on the merit but rather "sanctioned Gardner by dismissing the mixed case on procedural grounds. **A19.** The MSPB is bound by its own rules and regulations and the Federal Circuit did not, but should have, ruled on the MSPB's total disregard for its own rules and regulations. *Rogers, Accardi.*

C. MSPB Jurisdiction Is Not Determined By Filing Date.

The Federal Circuit did not adhere to this Court's decision in *Zipes*. Also see *Wallace*. In *Zipes* this Court held the filing requirements contained in the regulations are not jurisdictional issues but subject to equitable principles of waiver and estoppel. Title 5 contained no filing requirements for an MSPB appeal. Yet, the MSPB dismissal was based on lack of subject matter jurisdiction because of untimeliness. **A28,33.** The Federal Circuit's failure to adhere to this Court's ruling in *Zipes* deprived Gardner of a hearing on the merits.

IV. FEDERAL CIRCUIT DECISIONS ARE IN DIRECT CONFLICT WITH THIS CASE.

In *Anderson* the Federal Circuit held for the purposes of refiling an appeal, the refiling period commences when the Supreme Court denies certiorari. To hold otherwise, constitutes a sanction against Gardner for challenging related decisions that adversely affect his Constitutional rights. **A32, A37.** However, the Federal Circuit in this case sustained the sanction imposed against Gardner for exercising his Constitutional rights. The Federal Circuit's decision in *Gardner III* is in direct conflict with its decisions in *Phillips, Hamilton*, and *Walls*, where the court held good cause existed for waiver of the filing delay. It is also in direct conflict with *Wallace* where the Federal Circuit held a waiver of the filing requirement was not necessary when appellant

follows the refiling instructions. This Court's intervention would serve to re-align this case with Federal Circuit precedent.

A. Good Cause Exists For Filing Delay

The Federal Circuit held in *Phillips*, that appellant need only show that the filing delay was reasonable under the circumstance to constitute good cause.. In *Hamilton* the Federal Circuit held dismissal based on failure to follow one MSPB Order is arbitrary. *Id 647* Yet, in this case, the Federal Circuit sustained the MSPB's dismissal based on one ambiguous MSPB refiling instruction.

In the instance case, the record shows Gardner was diligently seeking redress of the MSPB's *sua sponte dismissal* of his initial mixed case during 4 of the 5 months from June 6, 1997. The agency was not prejudiced by Gardner's refiled appeal and the mixed case was refiled within 30 days from the date this Court denied certiorari.

Delay is excusable where, under the circumstances, a petitioner exercises diligence or ordinary care. *Phillip at 1391, Mendoza 652.* The Federal Circuit has not consistently applied the "good cause standard", as intended by Congress, to ensure federal employees receive a hearing if they want one. Good cause exists for any preceived filing delay and Gardner should be allowed a hearing.

B. Timely Delay Was Excusable Neglect.

The Federal Circuit in *Walls* said, "If the employee gives a **reasonable excuse for delay**, such excuse should be accepted, absent a showing of substantial prejudice to the agency.[emphasis added] *Walls 1581; Phillip,184.* Excusable neglect is neglect that a reasonably prudent person might

manifest under the circumstance. *Walls* at 1582. It was reasonable for Gardner to deem the Federal Circuit's initial decision as "final"after this Court denies certiorari. In fact, most attorneys including AJ Gee and Agency Attorney Wilson shared the same view since neither attorney timely objected to the timeliness of the refiled mixed case. In light of the Federal Circuit's decision in *Anderson* that the refiling period commenced when this Court denied certiorari, Gardner's interpretation of the refiling period was reasonable.

The *Walls* decision is supported by this Court's decision in *Pioneer* but both those decisions are in direct conflict with the Federal Circuit's decision in the instance case. In *Pioneer* this Court said when appropriate, a late filing caused by inadvertence, mistake, or carelessness, can be waived. This Court defined "excusable neglect" as not limited to cases where failure to act was due to circumstances beyond the movant's control, inadvertence, mistake, or miscalculation of the filing date constitutes excusable neglect.

It should be apparent that the December 16, 1997 re-filing date constitutes "excusable neglect" and the Federal Circuit did not adhere to its decision in *Wall* nor this Court's decision in *Pioneer*. The principles of due process, equity, and justice are awaiting execution by this Court.

CONCLUSION

The ultimate sanction of dismissal imposed on Mr. Gardner for exercising his Constitutional rights of due process is a compelling reason for this Court to grant certiorari. It is the MSPB, who failed to give Mr. Gardner a hearing and render a timely decision on the merits of his mixed case. It is the MSPB, who violated the law, its own rules, and

regulations to mask its malfeasance. And its the Federal Circuit, that declined to exercise its subject matter jurisdiction over the MSPB's malfeasance. Yet, it is Mr. Gardner who has been sanctioned for the arbitrary malfeasance of other tribunals. And it is Mr. Gardner's Constitutional rights that have been violated.

The issue surrounding the timeliness of Mr. Gardner's refiled MSPB is directly related to the September 25, 1997 petition for certiorari filed in this Court and this Court's November 17, 1997 denial of certiorari. Granted the MSPB's Acknowledgment Order recognized Mr. Gardner's refiled mixed case as timely and the Federal Circuit could have resolved this issue in Mr. Gardner's favor on that fact alone, but it did not! Instead, the Federal Circuit ignored these facts, as well as, the issue that its June 6, 1995 decision is void. Therefore, these important fundamental rights and arbitrary government actions have been intentionally left by the Federal Circuit for this Court to address.

In light of the well settled law that this Court will exercised jurisdiction to protect constitutional rights when it is plain that the fair results of a decision is to deny those rights, this Court should grant certiorari. Accordingly, this petition for a writ of certiorari is filed to redeem the rights guaranteed by our Constitution and federal statute affords Mr. Gardner. Those guarantees can only be redeemed by this Court granting certiorari.

Respectfully submitted this 10th day of October, 2000.

Bruce E. Gardner, Esq.

APPENDIX A

United States Court of Appeals for the Federal Circuit

99-3106

BRUCE E. GARDNER,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

DECIDED: April 12, 2000

Before LOURIE, CLEVENGER, and BRYSON, Circuit Judges

Per Curiam.

DECISION

Bruce E. Gardner appeals from the final decision of the Merit Systems Protection Board dismissing his appeal as untimely filed. See Gardner v. Department No. SF-0752-95-0278-I-3 (MSPB Dec. 11, 1998) ("Gardner III"). Because Gardner has not shown that the Board abused its discretion in dismissing his appeal, we affirm..

DISCUSSION

On November 26, 1994, the agency's Internal Revenue Service, Western Regional Office, removed Mr. Gardner from his position as a General Attorney. See Gardner v. Department of Treasury, No. SF-0752-95-0278-I-3, slip op. At 1 (MSPB Mar 3, 1998) (initial decision) ("Gardner

II"). Gardner appealed his removal, embarking on extensive litigation at the Board and a number of federal courts. See id. at 1-3. The majority of that litigation is not relevant to the narrow issue of timeliness presented before us. At his penultimate appearance before the Board, Gardner requested that his Board appeal be dismissed without prejudice so that he could pursue a simultaneous appeal that he had filed in this court. See id. at 2; see also Gardner v. Department of Treasury, No. 95-3770 (Fed. Cir. June 6, 1997) ("Gardner I"). Administrative Judge Hughes granted his motion, directing as follows:

This appeal is DISMISSED WITHOUT PREJUDICE. It may be refiled within the 35 days following the date of a final decision by the United States Court of Appeals for the Federal Circuit, on the appellant's petition for review now pending before that court.

See Gardner v. Department of Treasury, No. SF-0752-95-0278-I-2 (MSPB Oct 26, 1995). After we dismissed the appeal before us for lack of subject matter jurisdiction, see Gardner I, slip op. at 1, Gardner failed to follow Administrative **Judge Hughes' instructions**. [emphasis added]. **Rather, he petitioned the Supreme Court for certiorari and did not refile his appeal at the Board until December 15, 1997, approximately one month after Supreme Court denied his petition on November 17, 1997**. [emphasis added (sic)- petition was refiled on December 16, 1997, see **A39**] See Gardner II, slip op. At 3.

Administrative Judge Gee dismissed Gardner's refiled appeal as untimely, concluding that Gardner had failed to establish good for his approximately five month delay in

refiling. See id. At 4-7. The Board denied Gardner's petition for review, thereby **rendering the initial decision final**. [emphasis added]. See Gardner III, slip op. at 1. Gardner appealed to this court. We have jurisdiction pursuant to 28 U.S.C. §1295(a)(9) (1994).

We must affirm a Board decision unless it was arbitrary, capricious, an abuse of discretion, **or** otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; **or** unsupported by substantial evidence. See 5 U.S.C. § 7703(c)(1994); Chase-Baker v. DOJ, 198 F.3d 843, 845 (Fed.Cir. 1999). A petitioner has the burden of establishing excusable delay for an untimely petition for review. See Mendoza v. MSPB, 966 F.2d 650, 653 (Fed.Cir. 1992) (en banc). "[W]hether the regulatory time limit for an appeal should be waived based upon a showing of good cause is a matter committed to the Board's discretion and this court will not substitute its own judgment for that of the Board." *Id.*

Gardner argues that the Board erred in dismissing his appeal because it should have considered November 17, 1997, the date when the Supreme Court denied his petition for certiorari, as the date on which the 35-day refiling period should have commenced. Gardner alternatively contends that even if his refiled appeal was untimely, good cause justified his delay. Gardner specifically contends that his delay should be excused by the fact that he was acting pro se, and while acknowledging that he is a lawyer, Gardner notes that he has no experience in appellate litigation. Gardner also points out that all of his other submissions were timely submitted. Lastly, Gardner contends that the agency waived the timeliness issue by failing to raise the issue promptly before the Board.

We conclude that the Board did not abuse its discretion in dismissing Gardner's appeal. Administrative Judge Hughes unambiguously directed Gardner to refile his appeal to the Board within 35 days of the final decision of this court, which was on June 6, 1997. Gardner failed to comply with these instructions, choosing instead to seek review by the Supreme Court, and then refiling his appeal to the Board on December 15, 1997.**(sic)** We find no error in the Board's conclusion that his appeal was untimely. We further conclude that the Board did not err in holding that Gardner failed to establish good cause for the delay. As the Board indicated, the length of the delay (roughly five months) was quite long, and although Gardner was acting pro se, he is an experienced attorney who ought to appreciate the significance of a filing deadline. See Gardner II, slip op. at 7. Indeed, in light of his other appeals, Mr. Gardner is hardly a stranger to the appellate process. He had no basis to disregard the Board's deadline on the ground that he wished to seek Supreme Court review, and the fact that his other filings were timely does not excuse the untimeliness of the filing in this case.

Gardner lastly contends that the agency failed to promptly raise the timeliness issue before the Board and has therefore waived that issue. We disagree. The 35-day time limit was imposed by the Board and could have been raised by the Administrative Judge sua sponte. See Hamilton v. MSPB, 75 F.3d 639, 645 (Fed.Cir. 1996)(holding that "the Board may sua sponte raise the issue of an appellant's compliance with its regulations respecting timeliness"). Moreover, Gardner points to no Board rules requiring an objection relating to timeliness to be filed at any particular time.

Gardner's remaining arguments address issues unrelated to the timeliness of his refiled appeal, including the merits of his case. They are not reviewable if his appeal was untimely; accordingly, we do not address them, See Wallace v. MSPB, 728 F.2d 1457, 1459 (Fed.Cir. 1984) ("The sole issue is the correctness of the MSPB decision holding the appeal to the board was untimely, which no way involves the merits."). We therefore affirm.

APPENDIX B

United States Court of Appeals for the Federal Circuit

95-3770

BRUCE E. GARDNER,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

DECIDED: June 6, 1997

Before NEWMAN, MAYER, and SCHALL.
Circuit Judges

Per Curiam

This court does not have jurisdiction to hearing mixed cases those involving discrimination mixed with an appealable action-from the Merit Systems Protection Board. See, E.g., Williams v. Department of the Army., 715 F.2d 1485, 1489, 1489-91 (Fed. Cir. 1983). Bruce E. Gardner argues that this court has jurisdiction to hear the merits of his appeal because he filed an action for discrimination in a district court, thereby abandoning his affirmative defense of discrimination in this appeal. However, mixed discrimination cases, such as this one, cannot be bifurcated. Id. At 1491 ("where jurisdiction lies in the district court under 5 U.S.C.§7703(b)(2), the entire action falls within the jurisdiction of that court"). Accordingly, this appeal is dismissed.

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BRUCE E. GARDNER, Appellant, v. DEPARTMENT OF THE TREASURY Agency	) DOCKET NUMBER) SF-0752-95-0278-I-1) DATE:) July 20, 1995

Bruce E. Gardner, Esquire, Antelope, California, pro se
for the appellant

Robert J. Wilson, Esquire, San Francisco, California
For the agency.

BEFORE

Ben L. Erdreich, Chairman
Antonio C. Amador, Member

OPINION AND ORDER

This case is before the Board upon the appellant's timely petition for review of the April 13, 1995 initial decision that dismissed his appeal without prejudice to refiling within 35 days of that decision. For the reasons discussed below, we DISMISS the agency's motion to dismiss the petition for

review as moot, and DENY the appellant's petition for failure to meet the criteria for review set forth at 5 C.F.R.§ 1201.115. We REOPEN this case on the Board's own motion under 5 C.F.R.§1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still dismissing the appeal without prejudice to refiling.

BACKGROUND

The appellant timely appealed to the Board's San Francisco Regional Office (regional office) from the agency's action removing him from his GS-14 General Attorney position, Office the District Counsel, Internal Revenue Service, Sacramento, California. Appeal File (AF), Tab 1. The agency based its removal action on charges that the appellant failed to file Federal income tax returns, failed to timely file State of Maryland income tax returns, and failed to timely comply with State of California automobile registration requirements, AF, Tab 4, Substabs 4A, 4B, 4D. In his defense, the appellant alleged, inter alia, discrimination based on race, color, religion, sex, national origin, age, and disability, See, *e.g.* AF, Tabs 1, 3.

The administrative judge dismissed the appeal without prejudice to refiling by the prescribed time limit, finding that each party's right to a fair hearing could not be guaranteed under the Board's 120-day time limit for adjudicating appeals. Initial Decision at 1.

In his petition for review, the appellant contends that:(1) The initial decision dismissing his appeal without prejudice to refiling by the prescribed date was, inter alia, an abuse of discretion, arbitrary and capricious, and not otherwise in accordance with law; and (2) the administrative

judge erred in his ruling on certain of the appellant's motions. Petition for Review (PFR) File, Tab 5. The agency has timely responded in opposition to the petition for review. PFR file, Tab 7. In its response, it moves to dismiss the petition for review because the appellant has filed his petition for review pro se but has not submitted a change of representative or a revocation of his designated representative. *Id.* The appellant has filed a reply to the agency's response. PFR File, Tab 8.

ANALYSIS

With respect to the agency's motion to dismiss, the Board's regulations at 5 C.F.R.§1201.31(a) require that parties designate their representatives in writing, that any change in representation and any revocation of a designation of representative be in writing, and that notice of the change be filed and served on the other parites. In response to the agency's motion to dismiss, the appellant has submitted a sworn declaration from his representative below, stating, inter alia, that his representation of the appellant is limited to proceedings before the Board' regional office and that he continues to represent the appellant in matters before the regional office. PFR File, Tab 8, Declaration at 2. The record indicates that a copy of the appellant's reply and the declaration have been filed with the board and served on the agency. *See* PFR File, Tab 8. Therefore, we find that the appellant has satisfied the requirements of 5 C.F.R. §1201.31(a) and that the agency's motion to dismiss is moot.

An administrative judge is required to conduct fair and impartial hearings. 5 C.F.R. §1201.41(b). Thus, an administrative judge has broad discretion in controlling proceedings before him. 5 C.F.R.§1201.41(a)-.41(b).

Dismissal of an appeal without prejudice is a **procedural option** that is committed to the sound discretion of the administrative judge.[emphasis added] *See Padilla v. Department of the Air force*, 58 M.S.P. R. 561, 564 (1993); *Zell v. Department of the Army*, 57 M.S.P.R. 86, 87 (1993); *Keene v. Department of the Interior*, 47 M.S.P.R. 41, 44 (1991). Thus, an administrative judge has the discretion to dismiss an appeal without prejudice to refiling where an appeal cannot be fairly adjudicated within the Board's 120-day time limit for processing appeals. *See, e.g, Neubeiser v. Federal Energy Regulatory Commission*, 47 M.S.P.R. 125, 126-27 (1991).

Here the administrative judge based his finding that the parties could not be guaranteed a fair hearing under the Board's established 120-day time limit for adjudicating appeals on the following factors: (1) Consumption of the first 4 months of the appeal proceeding "by a number of motions and replies dealing with various complex legal issues"' (2) existing outstanding discover motions by both parites; and (3) the appellant's counsel's imminent commencement of a lengthy trial. Initial Decision at 1. We find that these reasons were sufficient to support the administrative judge's dismissal of the appeal without prejudice with leave to refiling at a later date. *See Neubeiser*, 47 M.S.P.R. at 126-27.

The appellant contends, however, that dismissal of his appeal without prejudice was still improper because he alleged below discrimination based on"race, color, sex, and [disabling] condition" and his appeal is, therefore, a mixed-case appeal subject to the 120-day statutory adjudicatory time limit set forth at 5 U.S.C.§ 7702(a)(1)(B)(v). PFR File, Tab 5 at 16-19. He therefore argues that the expiration of the 120-

day time limit for processing his appeal divested the Board of jurisdiction over the appeal. *Id.* **An administrative judge may, however, in the exercise of his adjudicatory discretion, dismiss a mixed case without prejudice to refiling**. [emphasis added] *See Sheehan v. Department of the Army*,.43 M.S.P.R. 204, 205-08 (199). Thus, the Board retains jurisdiction over the instant appeal.

Further, we find that the appellant has not shown that he was prejudiced by the administrative judge's dismissal of his appeal. The appellant argues that his rights have been prejudiced because he is "out of work, and now out of[c]ourt, and surviving on limited resources until these injustices are corrected." PFR File, Tab 5 at 10. The appellant, however, has not shown that any of these situations is onerous. *See Neubeiser*, 47 M.S. P.R. at 128. Neither has he shown that the administrative judge's dismissal of the appeal, even if it was error, prejudiced his substantive rights inasmuch as he was afforded an opportunity to refile his appeal. *See id.*

Finally, because we find that the administrative judge properly dismissed the appeal without prejudice to refiling, and **there have been no findings on the merits of the appeal**, we find that the appellant's challenges of the administrative judge's rulings on his motions are premature. *See, e.g. id* at 128-29.[1] [emphasis added].

---

1. In reaching our decision, we have not considered the appellant's additional argument relating to these rulings that he raised in his reply to the agency's response because we find that these arguments were filed after the close of the record on review and do not meet the requirement of 5 C.F.R.§ 1201.114(I)

Because the administrative judge's stated time limit for refiling the appeal expired while the appellant's petition for review was pending, the appellant may refile his appeal within 35 days of the date of issuance of this decision. *See Zell,* 57 M.S.P.R. at 88 n.2.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R.§ 1201.113©

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction.[emphasis added] *See* 5 U.S. C. §7703(a)(1). You must submit your request to the court at the following address:

United States Court of appeals
For the Federal Circuit
717 Madison Place, N.W..
Washington, D.C. 20439

The court must receive your request for review no later than 30 calendars days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. §7703(b)(1).

APPENDIX D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BRUCE E. GARDNER., Appellant, v.	} DOCKET NUMBER } SF-0752-95-0278-I-3
DEPARTMENT OF TREASURY, Agency.	} DATED: } December 12, 1998

Bruce E. Gardner, Esquire, Washington, D.C., pro se.

Robert J. Wilson, Esquire, San Francisco, California, for the agency

BEFORE
Ben J. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

ORDER

We find that the agency's response to the appellant's petition for review was timely filed under 5 C.F.R.§§ 1201.23 and 1201.114(d), and DENY the appellant's motion to strike the agency's response and the agency's motion to strike the appellant's reply to its response. After full consideration, we DENY the appellant's petition for review of the initial decision issued on March 3, 1998, because it does not meet the criteria for review set forth at 5 C.F.R.

§1201.115.[emphasis added] This is the Board's final order in this appeal. **The initial decision in this appeal is now final**. 5 C.F.R.§ 1201.133(b)

APPENDIX E

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

BRUCE E. GARDNER., Appellant,	}
v.	} DOCKET NUMBER }SF-0752-95-0278-I-3
DEPARTMENT OF TREASURY, Agency.	}DATED: }December 23, 1997

ACKNOWLEDGMENT ORDER

Appellant has refiled a petition in accordance with MSPB Order April 13, 1995. [emphasis added]. All submissions filed hereafter shall be directed to the undersigned Administrative Judge. A copy of appellant's submission refiling the appeal is enclosed with the agency's copy of this Order.(sic)

The parties are advised that the prior Board record in this matter Bruce E. Gardner v. Department of the Treasury, MSPB Docket No. *SF-0752-95-0278-I-1*, may be referred to during the adjudication of this appeal. As such, **you need not furnish the documents from the prior record.** [emphasis added].

The procedures and instructions set forth in the Board's Order from the earlier appeal remain in effect.

If they have not already done so, within 15 days of the date of this Order, the parties shall confer to define the issues, agree to stipulations, and discuss the possibility of settlement. The Administrative Judge is available to facilitate the discussions. The parties must communicate to each other concrete, specific settlement offers within 5 days of their conference unless a party concludes in good faith that no compromise of any kind is possible. Negotiations should be continuing and the parties must be prepared to discuss settlement status with the Administrative Judge.

FOR THE BOARD;

_____

Jennifer Gee
Administrative Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

95-3770

BRUCE E. GARDNER,

Petitioner,

V.

DEPARTMENT OF THE TREASURY,

Respondent.

ON MOTION

Before PLAGER, Circuit Judge.

ORDER

Bruce E. Gardner moves for reconsideration of this court's September 21, 1995 order dismissing his petition for review. The Department of the Treasury has not responded.

This matter stems from Gardner's appeal to the Merit Systems Protection Board of his removal from a general attorney position by the Internal Revenue Service. On April 13, 1995, the administrative judge dismissed the appeal without prejudice to refiling within 35 days, finding that the parties could not be guaranteed a fair hearing under the Board's 120-day time limit. Gardner petitioned the Board for

review arguing, inter alia, that the dismissal was improper because cases involving discrimination defenses must be decided within a 120-day statutory period pursuant to 5 U.S.C.§7702 (a)(1)(B)(v). On July 20, 1995, the Board affirmed the dismissal and granted Gardner an additional 35 days to refile. **The Board's decision also informed Gardner that he could petition this court for review.** [emphasis added]. Gardner states that on August 24, 1995 he simultaneously refiled a "protective" appeal with the regional office and petitioned this court for review. On August 29, 1995, the AJ acknowledged that Gardner had refiled his appeal pursuant to the July 20 order. On September 21, 1995 this court dismissed the petition for review without prejudice to refiling after the Board acted on Gardner's appeal.

Gardner may either petition this court for review or he may proceed with his appeal at the regional office, but not both. We note that **if Gardner proceeds at the Board and does not prevail, he will be able to present his arguments concerning the 120-day period to this court after the Board completes its proceedings.** [emphasis added].

Accordingly,

IT IS ORDERED THAT:

Gardner's motion for reconsideration is held in abeyance. If Gardner informs the court within 14 days that he has withdrawn his appeal at the regional office, then the court will reinstate his petition.

Nov 22, 1995

-s-
S. Jay Plager
Circuit Judge

cc: Bruce E. Gardner
Geoggrey C. Cook, Esq

APPENDIX G

UNITED STATES OF AMERICA
MERITS SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

BRUCE E. GARDNER, Appellant,	)	
v.	)	DOCKET # SF-0752-95-0278-I-2
DEPARTMENT OF THE TREASURY, Agency.	)	DATE: October 17, 1995

ORDER AND NOTICE OF HEARING AND REHEARING CONFERENCE

The hearing in this appeal will be held:

Date: Tues., December 5, 1995
Time: 9:00 a.m.
Location: Sacramento Area

The agency is instructed to provide appropriate space for the hearing, and to notify all concerned of the specific location.

If the appellant fails to appear without good cause, the **appeal will be decided without a hearing**. [emphasis added]. If the agency representative fails to appear, the hearing will absent extraordinary circumstances, proceed as scheduled.

APPELLANT'S RIGHT TO DISMISSAL WITHOUT PREJUDICE

The agency's attorney has supplied me with various documents which indicate that the appellant is attempting to pursue a petition for review before the U.S. Court of Appeals for the Federal Circuit, and that he has characterized the appeal now before me as merely a "protective appeal."

When the Board remanded this appeal to me, I became obligated to adjudicate it within the Board's normal 120-day time limit, and accordingly it has now been set for hearing [emphasis added].

However, the agency's attorney has stated that he would not oppose a motion by the appellant for a dismissal without prejudice, pending a final adjudication by the Federal Circuit. If the appellant files such a motion by October 17, it will be granted.

If such a motion is not filed, I will promptly rule on the outstanding discovery matters.

REHEARING SUBMISSION

The agency and the appellant are instructed to file (mail or FAX) the following by time of pre-hearing conference:

(1) A statement of facts and issues. The appellant must include any and all defense. (Parties may simply state that they are relying on previous statements, if such is the case.)

(2) A list of all agreed upon material facts.

(3) A list of witnesses with a brief summary of the expected testimony of each witness.

(4) A copy of exhibits accompanied by an index identifying the documents. The parties must separately mark for identification each and every document. Appellant must mark exhibits by, the agency by number. Documents previously submitted to the Board by either party are already **a part of the record and are not to be offered as exhibits.** [emphasis added.].

NOTE: **In presenting evidence at the hearing, the parties will be limited by their rehearing submissions, except for a good cause showing** [emphasis added].. For example, an unlisted witness will usually not be permitted to testify.

WITNESSES

The agency must provide for the appearance of its employees who are approved as witnesses; thus no subpoenas for them are necessary. If a witness who is not a federal employee will not appear voluntarily, that person may be subpoenaed to appear and testify. To be timely, a motion for subpoena must be filed no later than pre-hearing conference. The requesting party is responsible for serving the subpoena and for appropriate witness fees.

REHEARING CONFERENCE

I will conduct a telephonic rehearing conference on Tues. Nov. 28, 1995, at 9:00 am. The parties must be familiar with the facts and issues of the appeal and be prepared to discuss them.

Settlement will be discussed, and representatives must have the authority to settle this appeal.

FOR THE BOARD:

-S-

FENTON H. HUGHES
Administrative Judge
(415) 705-2935
FAX (415)705-294X106

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ORDER

A petition for review of an order of the Merit Systems Protection Board having been docketed in this court, and it appearing that the petitioner pursuant to that order, had refiled his appeal before the Merit Systems Protection Board regional office in San Francisco California, it is

ORDERED that the petition for review be, and it hereby is, DISMISSED, without prejudice to the subsequent filing of a petition for review after the Merit Systems Protection Board has again acted in the case.

FOR THE COURT,

September 21, 1995

-s-
Francis X. Gindhart
Clerk

cc: Clerk's Office, MSPB
BRUCE E. GARDNER
GEOFFREY C. COOK
ISSUED AS A MANDATE: September 21, 1995

GARDNER V TREASURY, 95-3770
(MSPB - SF075290278I-1)

****

* Note: Pursuant to Fed. Cir. R.47.6, this order is not
* citable as precedent. It is a public record.

****

APPENDIX J

UNITED STATES OF AMERICA
MERITS SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

BRUCE E. GARDNER, Appellant,	)	
v.	)	DOCKET # SF-0752-95-0278-I-2
DEPARTMENT OF THE TREASURY,	)	
Agency.	)	DATED: August 29, 1995

ACKNOWLEDGMENT ORDER

The appellant has timely re-filed his appeal pursuant to the Board's Opinion and Order of July 20, 1995. **That Order allowed appellant only to re-file an individual appeal**, and if the appellant intends to file a class appeal under 5 C.F.R.§ 1201.27, the motion is rejected. [emphasis added].

I have requested that the case filed be sent from the Board, when I have had an opportunity to review it, I will issue new instructions to the parties. [emphasis added.]

ORDER OF THE BOARD

- S -
Fenton H. Hughes
Administrative Judge

APPENDIX K

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

BRUCE E. GARDNER, Appellant, v. DEPARTMENT OF THE TREASURY Agency	) DOCKET NUMBER) SF-0752-95-0278-I-3) DATE:) March 3, 1998

Kenneth Lehman, Esquire, Alexandria, Virginia,
for the appellant

Robert J. Wilson, Esquire, San Francisco, California
For the agency.

BEFORE
Jennifer Gee
Administrative Judge

INITIAL DECISION

INTRODUCTION

On December 15, 1997 **(sic)**, appellant refiled a petition with the Board's Western Regional Office appealing

the action taken by the agency's Internal Revenue Service, Western Regional Office, to remove him from his position as General Attorney (Tax), GS-0905-14, Step 6, effective November 26, 1994.

For the reasons set forth below this appeal is DISMISSED as untimely filed.

DISCUSSION

Procedural Background

Appellant initially filed his appeal with the Board on December 15, 1994, (sic) That appeal, MSPB Docket No SF-0752-95-0278-I-1 ("Initial Appeal"), was dismissed without prejudice on April 13, 1995, by Administrative Judge Fenton Hughes, based on a finding that each party's right to a fair hearing could not be guaranteed under the Board's 120-day time limit for adjudicating appeals. Judge Hughes' decision provided that the appeal could be refiled "at any time during the 35 days following the date of [the] initial decision." (Initial Decision, MSPB Docket No. SF-0752-95-0278-I-1.)

On May 17, 1995, the Board received a petition for review filed by appellant asking it to review a number of issues from his initial appeal, including Judge Hughes' dismissal of his appeal without prejudice. (Petition for Review ("PFR") File, Tab 5). On July 20, 1995, the Board issued a decision affirming Judge Hughes' dismissal of the Initial appeal without prejudice. *Gardner v. Department of the Treasury, 68 M.S.P.R. 258 (1995).* In its decision, the Board stated that "[b]ecause the administrative judge's stated time limit for refiling the appeal expired while the appellant's petition for review was pending, the appellant may refile his appeal within 35 days of the date of issuance of this decision." *Gardner v. Department of the Treasury, 68 M.S. P. R. at 262.*

On August 24, 1995, appellant refiled his appeal with the Board's San Francisco Regional Office, characterizing it as a "protective appeal of Appellant's right because on May 24, 1995, [sic] Appellant appealed the decision of the Merit Systems Protection Board to the U.S. Court of Appeals, Federal Circuit." This second petition for appeal ("Second PFA") was docketed as MSPB Docket SF-0752-95-0278-I-2. On August 24, 1995, appellant simultaneously filed a petition for review with the Court of Appeals for the Federal Circuit ("Federal Circuit") asking it to review the Board's July 20, 1995, decision.

On September 21, 1995, the Federal Circuit dismissed appellant's petition for review because he had refiled his appeal with the Board. On October 2, 1995, appellant petitioned the Federal Circuit to reconsider its dismissal order. On October 24, 1995, appellant's counsel asked Judge Hughes to dismiss his Second PFA "pending a final adjudication by the Federal Circuit." (Initial Appeal File for Second PFA, Tab 4.) On October 26, 1995, Judge Hughes granted appellant's request for a dismissal without prejudice, specifying in his decision that the appeal could be "re-filed within the 35 days following the date of a final decision by the United States Court of Appeals for the Federal Circuit, on the appellant's petition for review now pending before that Court." (Initial Decision, MSPB docket No. SF-0752-95-0278-I-2). On November 22, 1995, the Federal Circuit issued an order stating that appellant could no pursue his appeal through the Federal Circuit and the Board and ordered his motion for reconsideration of its dismissal order held in abeyance until appellant informed the Clerk's Office that he had withdrawn his appeal with the San Francisco Regional Office. (Appellant's Opposition to Motion to Dismiss for

Lack of Jurisdiction, Initial Appeal filed for Third PFA, Vol.3, Tab 30.) The Federal Circuit subsequently vacated its October 2, 1995, dismissal of appellant's petition for review. However, on June 6, 1997, the Federal Circuit dismissed appellant's petition for review for lack of jurisdiction because this was a mixed discrimination case which could no be bifurcated and had to be heard in the U.S. District Court. *Bruce E. Gardner v. Department of the Treasury, No.95-3370,* slip op. (Fed.Cir.June 6, 1997). The Clerk of the Federal Circuit issued the mandate on July 29, 1997. Appellant filed a petition for certiorari with the United States Supreme Court on September 25, 1997, seeking review of the Federal Circuit's dismissal of his petition for review. The Supreme Court denied his petition for certiorari on November 17, 1997. On December 15, 1997, **(sic)** appellant refiled the current petition for appeal, MSPB Docket No.SF-0752-95-0278-I-3 ("Third PFA"), with the Western Regional Office.

Motion to Dismiss

On February 10, 1998, the agency filed a Motion to Dismiss for Lack of Jurisdiction in the instant proceeding. The agency presented a number of argument in support of its motion. First, the agency argued that the Board lacks jurisdiction over the appeal because the appeal was not refiled within 35 days of the July 20, 1995, Board decision affirming Judge Hughes' dismissal without prejudice of the initial appeal, and there was no stay of that Board decision by the Federal Circuit.

There is no merit to this argument. The Board's July 20, 1995, decision gave appellant 35 days from the date of that decision to refile his petition for appeal with the Board's San Francisco Regional Office. Appellant met that deadline

by refiling his appeal on August 24, 1995. There was no need for appellant to seek a stay of the July 20, 1995, Board decision since he refiled the petition for appeal as instructed by the Board.

The agency acknowledges that appellant filed his Second PFA within the required 35 days but made a cryptic comment that "the dismissal without prejudice of October 26, 1995 was not itself a stay but rather was a statement of fact that if proper appeal procedures were followed, including a proper request for a stay, that the dismissal was without prejudice and that the mandate of the board allowing a refiling within 35 days would be followed." (Agency Motion to Dismiss for Lack of Jurisdiction, Initial Appeal file for Third PFA, vol.2, Tab 19.) Appellant's Second PFA was the refiling of his Initial Appeal as ordered by the Board in its July 20, 1995, order. He refiled the Initial Appeal of August 24, 1995, to preserve his right to appeal the agency's removal action. Since he filed the Second PFA as directed by the Board, he did not need to seek a stay of the Board's order.

The agency also argues that the Board has no jurisdiction over the appeal because the Federal Circuit's June 6, 1997, dismissal order did not provide appellant with an opportunity to refile his appeal with the Board. [emphasis added]. There is also no merit to this argument. The Federal Circuit did not have to provide appellant with an opportunity to refile his appeal because Judge Hughes did so in his dismissal of the Second PFA on October 26, 1995.

The agency also argues that **the Board lacks jurisdiction** because neither the Federal Circuit nor the Supreme Court stayed the Federal Circuit's June 6, 1997,

decision, and appellant's failure to refile his appeal within 35 days of the June 6, 1997, Federal Circuit decision renders this appeal untimely. **There is merit to this argument.**

The Federal Circuit's decision was filed June 6, 1997. Under Local Rule 41 of the Federal Rules of appellate Procedure for the Federal Circuit, the Federal Circuit's dismissal order became final on June 6, 1997, the date of the certified order, because appellant did not request a stay of the mandate from the Federal Circuit or the Supreme Court. *See also* 28 U.S.C.§2101(f). Under the terms of Judge Hughes' decision, Appellant had until July 11, 1997, 35 days from June 6, 1997, to refile his appeal with the Board. He did not do so until December 15, 1997 **(sic)**, approximately 5 months later.

At the time Judge Hughes dismissed appellant's Second PFA without prejudice, he stated very clearly in his decision that the petition for appeal was to be "refiled within 35 days following the date of a **final** decision by the United States Court of Appeals for the Federal Circuit." (Initial Decision in MSPB Docket No SF-0752-97-0278-I-2 (emphasis added.)

Appellant's failure to refile his petition on time can be waived for good cause. However, it is appellant's burden to demonstrate good cause for his delay in refiling the appeal. *Walls v. Mert Systems Protection Board,* 29 F.3d 1578 (Fed.Cir. 1994); *Alonzo v. Department of the Air Force,* 4 M.S.P.R. 180, 184 (1980). The factors examined in determining whether there is good cause justify a waiver of the late filing include the length of the delay; the reasonableness of the appellant's excuse and his showing of due diligence; whether the appellant is acting pro; or whether

there were circumstance beyond his control that caused the delay. *Neal v. Department of the Air Force*, 68 M.S.P.R. 26 (1995).

In this instance, the delay is not minimal. Appellant did not file his appeal until five months after the Federal Circuit's decision was final. There were no circumstances beyond appellant's control. Appellant was pro se at the time he filed the third PFA. However, his pro se status has no effect in the determination of whether his untimely filing should be waived. Appellant is an experienced attorney, as demonstrated by his earlier filings with the Board, including his filing of the protective appeal after the Board issued its decision affirming Judges Hughes' first dismissal without prejudice.

In opposition to the agency's motion, appellant argues that his re-filing was timely because the "denial of certiorari constituted the final decision on Mr. Gardner's federal appeal(s)." (Appellant's Opposition to Motion to Dismiss for Lack of Appellate jurisdiction, page, Initial Appeal file in Third PFA, vo. 3, Tab 30.) While the denial of his petition for certiorari may have been the final decision on Mr. Gardner's federal appeals, Judge Hughes' decision dismissing the Second PFA specifically directed him to refile his appeal within"35 days following the date of a final decision by the United States Court of Appeals for the Federal Circuit," not within 35 days following the final decision of all his "federal appeals". More significantly, Judge Hughes' condition for refiling was made at the request of appellant's counsel at the time. In his October 24, 1995, request to dismiss the Second PFA without prejudice, appellant's counsel specifically asked to have it dismissed "without prejudice, pending a final

adjudication by the Federal Circuit." (Appellant's Motion for Dismissal of an Appeal Without Prejudice, Initial Appeal File in Second PFA, Tab 4.) Since the refiling requirement was one requested by appellant's own counsel, he cannot now argue that the refiling did not have to take place until all his federal appeals had been exhausted. (*Staples v. United Postal Service*, 67 M.S.P.R. 36 (1995) *aff'd*, 70 F.3d 129 (Fed.Cir. 1995) (Table).) He was given the dismissal he asked for.

Appellant has also argued that he did not miss an appeal filing deadline "because it as never clearly established." (Appellant's Opposition to Motion to Dismiss for Lack of Appellate Jurisdiction, page 4, Initial Appeal file in third PFA, Vol 3, Tab 30.) I find no merit to this argument. Judge Hughes adopted the filing deadline suggested by appellant's own counsel.

Appellant has alternatively argued that Judge Hughes' April 13, 1995, decision was not final until the Supreme Court denied certiorari on November 17, 1997. This argument is disingenuous. If appellant sincerely believed that the April 13, 1995, decision was not final until November 17, 1997, he would not have refiled the appeal on August 24, 1995, after the Board's decision affirmed Judge Hughes' decision. Moreover, his refiling highlights his realization that the Board' August 24, 1995, decision had superseded Judge Hughes' first dismissal. His characterization of that filing as a "protective appeal" only serves to acentuate his knowledge of the legal system and the need to preserve one's rights in an appellate process. He did not seek a stay of the Board's decision while he was pursing his appeal through the Federal Circuit, so he preserved his appeal rights by filing his Second PFA. Since he elected not to seek a stay on the Federal

Circuit's decision, he should have acted again to preserve his appeal rights by filing another "protective appeal," especially since it was his own counsel's request to only dismiss his appeal until the Federal Circuit's decision became final.

Since I have found appellant has failed to demonstrate good cause to waive his untimely refiling of the appeal, there is no need to address the issue of whether there would be prejudice to the agency by accepting the refiling. However, I note that appellant argued there was no prejudice because the agency, and in particular, its representative, Robert Wilson, has been involved in this entire case for three years. This argument is interesting since appellant unsuccessfully moved to disqualify Mr. Wilson and all of the agency's attorneys in its Western General Litigation Center from representing the agency in this case. If his motion had been successful, he would not have been able to present this argument.

In brief, I find appellant has failed to establish good cause to waive the untimely refiling of his appeal. His 5-month delay was significant. Though the Third PFA was filed pro se, appellant is an attorney who has demonstrated his knowledge of the federal legal system and the Board's appellants processes through **the lengthy proceedings that have taken place in this appeal.** [emphasis added] The dismissal of the Second PFA without prejudice was done at the request of appellant's counsel and adopted a condition for refiling suggested by his counsel. Appellant cannot now argue that his counsel's suggestion was unclear or that something else was intended.

The agency also argues that the Board has no jurisdiction to consider the appeal because appellant elected to pursue his discrimination claims through the U.S. District

Court by filing a mixed case appeal action in U.S. District Court on August 29, 1995. In view of my finding that appellant has failed to demonstrated good cause to excuse his late filing of the appeal, there is no need to address the agency's last argument.

DECISION

The agency's motion to dismiss is GRANTED.[emphasis added]. This appeal is DISMISSED as untimely filed.

FOR THE BOARD

S

Jennifer Gee
Administrative Judge

APPENDIX L

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BRUCE E. GARDNER, Appellant,	
v.	DOCKET NUMBER SF-0752-95-0278-I-2
DEPARTMENT OF THE TREASURY Agency	DATE: October 26, 1995

Joseph L. Russell, Esquire, Antelope, California, for the appellant

Robert J. Wilson, Esquire, San San Francisco, California For the agency.

BEFORE
Fenton H. Hughes
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant timely appealed his removal from the position of General attorney (Tax), GS-14, effective November 26, 1994. The Board has appellate jurisdiction under 5 U.S.C. §§§7511-13.

The appellant has a petition for review pending with U.S. Court of Appeals for the Federal circuit, concerning an earlier Opinion and Order of the Board. He has moved for a dismissal without prejudice pending a final decision by the Federal Circuit. The agency has no objection to the motion, which is granted in the interest of judicial economy.
[original decision not found-text taken from Fed.Cir. Exhibit.}

APPENDIX M

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BRUCE E. GARDNER, Appellant,	)
v.	) DOCKET NUMBER) SF-0752-95-0278-I-1
DEPARTMENT OF THE TREASURY Agency	) DATE:) April 13, 1995

Joseph L. Russell, Esquire, Antelope, California, for the appellant

Robert J. Wilson, Esquire, San San Francisco, California For the agency.

BEFORE
Fenton H. Hughes
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant timely appealed his removal from the position of General attorney (Tax), GS-14, effective November 26, 1994. The board has appellate jurisdiction under 5 U.S.C. §§§7511-13.

Almost the first four months of this proceeding have been consumed by a number of motions and replies dealing with various complex legal issues. In addition, both parties have discovery motions outstanding. Finally, the appellant's attorney is about to commence a lengthy trial.

Inasmuch as the right of each party to a fair hearing obviously can not be guaranteed by adhering to the Board's normal 120-day time period for adjudicating an appear, the appeal will be dismissed without prejudice on the terms set forth below.

Re-filing of the appeal will not trigger a new deadline for filing discovery motions. Rather, a ruling on the outstanding discovery motions will be made on re-filing, and according to the time table agreed to **in the teleconference on April 12.** [emphasis added].

DECISION

The appeal is DISMISSED WITHOUT PREJUDICE. It may be re-filed by the appellant at any time during the 35 days following the date of this initial decision. Re-filing may be by letter directed to the undersigned, with service on the opposing attorney. Any documents submitted in connect with this appeal should not be resubmitted with the refiled appeal.

FOR THE BOARD:

-s-
Fenton H. Hughes
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on May 18, 1995, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

APPENDIX N

UNITED STATES OF AMERICA
MERITS SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

BRUCE E. GARDNER, Appellant,	)	
	)	DOCKET #
v.	)	SF-0752-95-0278-I-1
DEPARTMENT OF THE TREASURY,	)	
	)	DATE:
Agency.	)	December 16, 1997

BRUCE E. GARDNER, Pro Se.

ROBERT WILSON, Esquire, San Francisco, California, for the Agency.

BEFORE
Fenton H. Hughes
Administrative Judge

NOTICE OF REFILING APPEAL

APPELLANT, Bruce E. Gardner, in accordance with the United States Supreme Court's November 17, 1997 decision denying certiorari, the decision of the United States Court of Appeals for the Federal Circuit, and the Merit systems Protection Board's (MSPB) July 20, 1995 decision, hereby

refiles his December 23, 1994[1] appeal to Treasury's adverse personnel action. This new appeal is timely and directly placed Treasury's November 26, 1994 adverse personnel action against Mr. Gardner in issue. It should be noted that the only change in this refiled appeal and the December 23, 1994 appeal is that appellant is pro se.

IN SUPPORT of this refiled appeal the procedural background related to this case is set forth below.

1. On April 13, 1995, an initial decision to dismiss Mr. Gardner's December 23, 1994 mixed case appeal without prejudice with a right to refile within 35 days before the decision became final was rendered. The April 13th decision became final after the expiration of said 35 day period unless the decision was appealed within said time period.

2. On May 15, 1995 Mr. Gardner timely petitioned the MSPB in Washington, D.C. to review the April 13th Initial Decision dismissing his appealed mixed case. He asserted the statutory 120 day period in which a decision was required to be rendered on both the merits on the adverse personnel action and the discrimination claim pursuant to 5 U.S.C.§ 7702(a)(1) would be violated if the sua sponte April 13th initial decision to dismiss his appeal over his objection was allowed to stand.

---

1. Note added- the MSPB deemed Gardner's Whistleblower Appeal filed on December 15, 1995 as the date his "mixed case" was filed and not December 23, 1994 when Gardner actually filed his "mixed case".

3. On July 20, 1995, the MSPB sustained the initial decision. Before said decision became final Mr. Gardner timely petitioned the United States Court of Appeals for the Federal Circuit to review the MSPB decision.

4. In a decision dated June 6, 1997 the Federal Circuit held it lacked subject matter jurisdiction to review the MSPB's July 20, 1995 decision. On June 30, 1997, appellant's timely motion for reconsideration submitted to the Federal Circuit was denied.

5. On September 24, 1997, Mr. Gardner timely petitioned the United States Supreme Court to review the Federal Circuit's decision.

6. On November 17, 1997, the Supreme court denied certiorari and therefore the *sua sponte* dismissal without prejudice of Mr. Gardner's appeal with a right to refile the appeal stands.

WHEREFORE, in accordance with the initial April 13th decision, Mr. Gardner refiles his December 23, 1994[2] appeal. He incorporates the December 23rd appeal of the adverse personnel action and all affirmative defenses, including those contained in the December 19, 1994 whistleblower appeal, as the basis of this appeal.

Respectfully submitted,

-s-

Bruce E. Gardner, Pro Se
P.O. Box 6183
Washington, D.C. 20044
(202) 271-0552.

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2. NOTE ADDED: December 15, 1994 was the filing date. December 19, 1994 is the date the MSPB received the appeal.

APPENDIX O

GARDNER V. MSPB, 99-3106
(MSPB - SF0752950278-I-3).

Mr. Francis X. Gindhart Sept 19, 1995
Clerk of the Court
U.S. Court of Appeals for the Federal Circuit
Washington, DC

Re: BRUCE E. GARDNER
MSPB Docket No. Sf-0752-95-0278-I-1
CAFC Aoeal No. 95-3770 **(sic)**

Dear Mr. Gindhart:

On September 1, 1995, we received notification from your office that a petition for review was filed with the court in the above referenced case. Please be informed that the San Francisco Regional Office has received a refiling on the initial appeal and the case file has, therefore, been forwarded to that office. Please inform us in writing if a certified list of the record is still required.

Sincerely,

-s-

Robert E. Taylor

cc: Bruce E. Gardner
8522 Scotswood Way
Antelope, CA 95843

David Cohen, Director
Commercial Litigation Branch
Civil Division
Attn: Second Floor Classification Unit
Washington, D.C. 20530

APPENDIX P

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

BRUCE E. GARDNER, own his own behalf, and as representative of all present and former African-American employees of the Department of the Treasury through its subagency the Internal Revenue Service and its Chief Counsel's Office subject to adverse personnel actions.	} Docket # } SF-0752-95-0278-I-1 } } } } } } DATED: } August 24, 1995 } }
Appellants,	}
v.	}
DEPARTMENT OF THE TREASURY,	}
Agency	}

JOSEPH L. RUSSELL, Esquire, Sacramento, California, for the Appellant.

ROBERT WILSON, Esquire, San Francisco, California, for the Agency.

BEFORE
Fenton H. Hughes
Administrative Judge

NOTICE OF REFILING APPEAL

APPELLANT, Bruce E. Gardner, in accordance with the July 20th, 1995 decision of the Merit Systems Protection Board sustaining the Administrative Judge's decision to dismiss appellant's appeal without prejudice and granting him the opportunity to refile, hereby, files the above referenced appeal. This refiling constitutes **a protective appeal** of Appellant's rights because on [August] May 24, 1995 (sic), Appellant appealed the decision of the Merit Systems Protection Board to the U.S. Court of Appeals, Federal Circuit. [insert & emphasis added].

Hence pursuant to 5 CFR @1201.27, Appellant, on his own behalf, and as representative of all present and former African-American employees of the Department of the Treasury who were or are subject to adverse personnel actions by the Department of Treasury through its subagency, Internal Revenue Service and its Chief Counsel's Office during the ten year period 1985 through 1995, file this appeal.

Respectfully Submitted,

S

Joseph L. Russell
Attorney for appellant
3101 First Avenue
Sacramento, CA 95817
Office (916) 456-8032
Fax (916) 455-9021

APPENDIX Q

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

BRUCE E. GARDNER,	)	
Appellant,	)	DOCKET #
v.	)	SF-0752-95-0278-I-1
DEPARTMENT OF THE	)	
TREASURY,	)	DATE:
Agency.	)	October 24, 1995

MOTION FOR DISMISSAL OF APPEAL WITHOUT PREJUDICE

As your honor already knows, an adverse decision was rendered against Appellant by the U.S. Merit Systems Protection Board on July 20, 1995, in Washington, D.C. giving him until August 24, 1995, to refile his contested dismissal appeal

On August 24, 1995, Appellant, by facsimile, transmitted a "protective appeal" to the U.S. Merit Systems Protection Board's San Francisco Regional Office. This "protective appeal" was filed because of ongoing settlement discussions between Appellant's attorney, Joseph L. Russell and Agency's representative, Robert Wilson.

As of August 23, 1995, Appellant had already filed a Petition for Review of the U.S. Merit Systems Protection Board's decision with the Federal Circuit.

On September 21, 1995, the U.S. Court of Appeals for the Federal Circuit issued an order dismissing Appellant's Petition for Review citing Appellant's filing of his appeal with the U.S. Merit Systems Protection Board as it's basis. Since Appellant's Appeal with the U.S. Merit Systems Protection Board was "protective" in nature and not intended to replace the Federal Circuit Appeal, on October 2, 1995, Appellant filed with the Federal Circuit, a motion to vacate its Order. **If the Federal Circuit grants Appellant's motion and reinstates his petition for review, the herein appeal before the U.S. Merits Systems Protection Board will be dismissed.** [emphasis added] Also, pursuant to your October 17, 1995, Order and Notice of Hearing and Rehearing Conference, Appellant, through his counsel, has confirmed that the Agency's attorney, Mr Robert Wilson, has no opposition to your agreement to grant the herein motion to dismiss Appellant's appeal without prejudice, pending a final adjudication by the Federal Circuit.

DATED: October 24, 1995

Respectfully Submitted,

-s-

JOSEPH L RUSSELL
ATTORNEY FOR APPELLANT

APPENDIX R

MSPB
SF-0752-95-0278-I-1

BRUCE E. GARDNER
Appellant

v.

Dept. Of the Treasury,
Agency

AGENCY RESPONSE

ii. APPEAL

On December 12, 1994, Appellant filed a request for a stay. He did so by filng pages 1, 2, and 6 of the Appeal form (on December 23, 1994 a "missing" page 5 was forwarded0. Rather than issue an Order requiesting the Ageny response to the Stay, on December 19, the Board issued a standard acknowledgement order as if the advaerse action had been appealed. On December 20, the Board recognized that the filed application was for a stay and issued an order requireing Agency comments. On December 23, 1994 the Appellant filed his appeal of his adverse action gby enclosing pages 1,2,3, and 4 with attachments. No new ackowledgement order was issues. On January 3, 1995 the Agency filed (by facsimile) its response to request for stay.

Since the termination was effective November 26, 1994 **even the latest filing date of December 23, 1994 is timely. The agency has no objection to timeliness or jurisdcition.** [emphasis}.

APPENDIX S

United States Court of Appeals for the Federal Circuit

ORDER

A combined petition for panel rehearing and rehearing en banc having been filed by the PETITIONER, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

THE MANDATE OF THE COURT WILL ISSUE ON June 5, 2000.

FOR THE COURT,

-s-

Jan Horbaly, Clerk

Dated: May 18, 2000

cc: Bruce E. Gardner
Patricia A. Price

APPENDIX T

United States Court of Appeals for the Federal Circuit

ORDER

Before NEWMAN, Circuit Judge, MAYER, Circuit Judge, and SCHALL, Circuit Judge.

A petition for rehearing having been filed by the PETITIONER,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on July 28, 1997 unless another time becomes appropriate under Rule 41.

FOR THE COURT.
JAN HORBALY, CLERK

Dated: June 30, 1997

by_____
Alex Van Veen
Staff Law Clerk

cc: BRUCE E. GARDNER
GEOFFREY C. COOK

GARDNER V TREASURY, 95-3770
(MSPB - SF0752950278I-1)

****

Note: Pursuant to Fed;Cir.R. 47.6, this order is not citiable as precedent. It is a public record.

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APPENDIX U

UNITED STATES CODE ANNOTATED
CONSTITUIONAL AMENDMENT V

U. S. CONSTITUTION , Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Juy, except in cases arising in the land or naval forces, or in Militia, when in actual service in time of War or public danger; nor shall any person be subject for the office to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law;** nor shall private property be taken for public use, without just compensation. [emphasis added].

APPENDIX V

MERIT SYSTEM PROTECTION BOARD'S REGULATIONS INVOLVED

5 C.F.R. §201.24 **Content of an appeal; right to hearing.**
(d) *Right to hearing.* Under 5 U.S.C. 7701, an appellant has a **right** to a hearing.[emphasis added].

5 C.F.R.§1201.156 **Time for processing appeals involving allegations of discrimination.** states in part:
(a) *Issue raised in appeal.* When an appellant alleges prohibited discrimination in the appeal, the judge will decide both the issue of discrimination and the appealable action within 120 days after the appeal is filed.

5 C.F.R.§1201.41 **Judges**
(b) *Authority* Judges will conduct fair and impartial hearing and will **take all necessary action to avoid delay in all proceedings**. [emphasis added].

5 C.F.R§ 1201.12 **Revocation, amendment, or waiver of rules** states in part:
A judge may ...waive a Board regulation unless a statute requires application of the regulation

5 C.F.R.§1201.22(c) ***Timeliness of appeal***
If a party does not submit an appeal within the time set by statute, regulation, or order of a judge, it will be dismissed as

untimely filed unless a good reason for the delay is shown. The judge will provide the party an opportunity to show why the appeal should not be dismissed as untimely.

5 C.F.R.§1201.27(b) **Class Appeal**
The judge will consider the appellant's request and any opposition to that request, and will issue an order within 30 days after the appeal is filed stating whether the appeal is to be heard as a class appeal. If the judge denies the request, the appellants affected by the decision may file individual appeals within 25 days after the denial.

5 C.F.R.§201.43 **Sanctions.**
(a) *Failure to comply with an order.*
When a party fails to comply with an order, the judge may:
(1) Draw an inference in favors of the requesting party with regard to the information sought;
(2) Prohibit the party failing to comply with the order from introducing evidence concerning the information sought, or from otherwise relying upon testimony related to that information;
(3) Permit the requesting party to introduce secondary evidence concerning the information sought; and
(4) Eliminate from consideration any appropriate part of the pleadings or other submissions of the party that fails to comply with the order.
(b) *Failure to prosecute or defend appeal.* If a party fails to prosecute or defend an appeal, the judge may dismiss the appeal with prejudice or rule in favor of the appellant.
© *Failure to make timely filing.* The judge may refuse to consider any motion or other pleading that is not filed in a timely fashion in compliance with this subpart.

5 C.F.R§ 1201.51. **Scheduling the hearing.** states in part:
(a) The hearing will be scheduled not earlier than 15 days after the date of the hearing notice.

APPENDIX W

MERIT SYSTEMS PROTECTION BOARD
RULES INVOLVED

1) MSPB Judge's Handbook, Chapter 4, page 1,§ 1
A hearing **must** be held if the appellant requests one and the appeal is timely filed and within the Board's jurisdiction... *Dodd v. Department of Interior*, 48 M.S.P.R. 582, 584 (1991) **(appellant has right to hearing and *not* the agency or the AJ).** [emphasis added].

2) MSPB Judge's Handbook, Chapter 4, page 1,§ 4:

The hearing may not be scheduled earlier than 15 days from the date of the notice [of the hearing]...

...the AJ should usually provide 30 to 60 days notice of the hearing date. Optimally, the hearing will be held within 75 days of the date of receipt of the appeal.

3) MSPB Judge's Handbook, Chapter 4, page 3,§7b. states

... ***the AJ must set a date certain*** by which the appeal must be refiled. [emphasis added].

The AJ should consider, *inter alia*, the requirements of **due process** objection or lack thereof by the opposing party, and the requirements of **expeditious case processing** [emphasis added]..

An AJ should ***not grant*** ... **a dismissal without prejudice** when the appellant objects. Instead, a ***continuance*** should be granted...[emphasis added].

4) MSPB Judge's Handbook, Chapter 12, page 1c, states c. Time Frames. The decision should be issued within 120 days of the receipt of the appeal by the RO except for good cause shown.

5) *MSPB Hearing Procedures Guide*, page 35.
Added to these recognized common law privileges, Boards case may involve other claims of privilege, confidential information, including... the sanctity of taxpayer records collected the Internal Revenue Service.